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DOLLARS AND SENSE: A "NEW PARADIGM" FOR CAMPAIGN FINANCE REFORM?

Daniel A. Farber *

In Voting with Dollars,¹ Professors Ackerman and Ayres raise a multitude of issues as they seek to "rethink the very foundations of the enterprise" of campaign finance reform.² To provide a format for examining this "new paradigm,"³ this essay takes the form of a fictional panel discussion. All of the participants are generally sympathetic with the goals of the proposal, but they reach somewhat varying conclusions about its implementation.⁴

Moderator:

I am happy to welcome you all to this conference on "The Future of American Democracy." We are very grateful to the Dean for his generous financial support of this important symposium. I would also like to thank all of the participants who have come here today. I want to leave plenty of time for the panelists to give their views, so I will keep my introductory remarks very brief.

It is hard to be sanguine about the present state of American politics. The cost of political campaigns continues to mount, and fund-raising seems ever more critical to the efforts of candidates. Even the most unworldly of U.S. Supreme Court Justices now takes for granted that "someone making an extraordinarily large

* Sho Sato Professor of Law, University of California, Berkeley; McKnight Presidential Professor of Law, University of Minnesota. B.A., 1971, University of Illinois; M.A., 1972, University of Illinois; J.D., 1975, University of Illinois. I benefited from discussions about the book with Guy Charles before the drafting of this essay, and from comments on an early draft by David McGowan.

1. BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002).

2. *Id.* at 3.

3. *Id.* at 9.

4. By setting up the panel this way, I do not mean to imply that the validity of these goals is outside the range of legitimate discussion; rather, my focus here happens to be on the method of implementation.

contribution is going to get some kind of an extraordinary return for it.”⁵ In the meantime, the public is increasingly cynical about the process, discussion of issues takes second place to sensationalist “sound bites,” and voter participation is in the cellar. This does not correspond to most people’s vision of an ideal democratic process.

Indeed, the public’s view of politics has become so cynical as to threaten the basic legitimacy of the democratic process. Consider these statistics: When asked whether “the government was run for the benefit of the public or for special interests, in 1964” almost two-thirds of respondents thought the answer was “the public”; thirty years later, less than a fifth thought so.⁶ That’s a huge collapse of public confidence. Similarly, when asked whether “quite a few” government officials are “crooked,” only a quarter said yes in 1958, but twice as many thought so in 1994.⁷ Over roughly the same time period, the percentage who thought that officials ignore their constituents also nearly doubled.⁸ Clearly, concerns about special interests have reached epidemic proportions. At some point, you have to wonder if public confidence in democracy will collapse.

Yet, effective reform has proved elusive. A new book by two distinguished Yale professors, Bruce Ackerman and Ian Ayres, provides some wonderfully innovative ideas about how to reinvigorate democracy.⁹ That book is the subject of our session this morning.

Today, we have with us three leading scholars who will comment on the book. As I understand it, Professor Browne will summarize the book and explain the Ackerman and Ayres reform scheme. Professor Graye will explore the constitutional issues raised by their proposal. Finally, Professor Whyte of our own faculty will discuss the policy aspects of the proposal. I would especially like to thank Professor Whyte for taking part in the panel. He was a last-minute substitute when one of the original panelists had to cancel. Even though his primary interest is environmental law rather than constitutional law, he bravely agreed to help fill the gap.

5. Transcript of Oral Argument, *Nixon v. Shrink Mo. Gov’t Pol. Action Comm.*, 528 U.S. 377 (2000) (No. 98-963), available at 1999 U.S. TRANS LEXIS 76, at 27. See also John Copeland Nagle, *Corruption, Pollution, and Politics*, 110 YALE L.J. 293, 295 (2000).

6. David Schultz, *Revisiting Buckley v. Valeo: Eviscerating the Line Between Candidate Contributions and Independent Expenditures*, 14 J.L. & POL. 33, 96 (1998).

7. *Id.* at 98.

8. *Id.*

9. ACKERMAN & AYRES, *supra* note 1.

Before I turn the podium over to Professor Browne, I've been asked to make a couple of announcements. Those of you who are applying for CLE credit should put your names and addresses on the sign-up sheet at the back of the room. Also, box lunches will be served in the courtyard after this session. We didn't expect such a big crowd today, but we'll do our best to see that everyone gets something to eat. I guess, in retrospect, we shouldn't have been surprised that the book has received so much attention. And now, with no further ado, let me introduce Professor Browne.

Professor Browne:

It's a great honor to be participating in this symposium today. I'm especially delighted to be on this particular panel. Campaign reform is a critical topic, and this book offers the first really new thoughts about the subject for years. I'm going to try to give you a fairly complete picture of the book's major arguments. Before I begin, however, I'd like to thank our law review hosts for all the hard work they have done in setting up this symposium. I can only hope that the editing process will be equally pleasurable!

I can't really improve upon Ackerman and Ayres's own description of their proposals. I say "proposals" because there are really two interlinked ideas here. The first idea is the use of vouchers instead of direct government subsidies for campaigns. Ackerman and Ayres describe these vouchers, or "Patriot dollars" as they call them, as follows:

Just as [a citizen] receives a ballot on election day, he should also receive a special credit card to finance his favorite candidate as she makes her case to the electorate. Call it a Patriot card, and suppose that Congress seeded every voter's account with fifty "patriot dollars." If the 100 million Americans who came to the polls in 2000 had also "voted" with their patriot cards during the campaign, their combined contributions would have amounted to \$5 billion—overwhelming the \$3 billion provided by private donors.¹⁰

With these credit cards, citizens can fund campaigns with "[a] trip to their neighborhood ATMs, or eventually a click of their mouse on the Internet."¹¹ Thus, Patriot dollars are supposed to democratize campaign financing.

10. *Id.* at 4–5.

11. *Id.* at 18.

But what about those who still wish to make private donations? This is where the second idea, the secret donation booth, comes into play. Here is how Ackerman and Ayres describe the secret donation booth:

Contributors will be barred from giving money directly to candidates. They must instead pass their checks through a blind trust. Candidates will get access to all money deposited in their account with the blind trust. But we will take steps to assure that they won't be able to identify who provided the funds. To be sure, lots of people will come up to the candidate and say they have given vast sums of money. And yet none of them will be able to prove it. As a consequence, lots of people who *didn't* give gifts will also claim to have provided millions of dollars.¹²

Wow! Talk about cutting the Gordian knot!¹³

Before I get into the details of this elegant set of proposals, I should say something about the goals Ackerman and Ayres have in mind. As they point out, liberal democracy tries to fuse "two spheres of life":¹⁴ the public sphere, in which citizens meet as equals to decide public policy, and the private sphere of market transactions, in which economic inequalities are inevitable.¹⁵ But how do we know that those economic inequalities are legitimate? Only because they have been accepted by the political process, so that citizens have collectively agreed to the current distribution of wealth. But if wealth is allowed to drive politics, this process becomes circular, so that the current distribution of wealth just ends up perpetuating itself via the political process.¹⁶ If wealth inequality is to be legitimate, therefore, "one person one vote" must not be allowed to deteriorate into "one dollar one vote." More importantly, "[u]nless we find a way to democratize campaign finance, the right to vote will become mere shadow play."¹⁷

12. *Id.* at 6.

13. The law review editors were worried that the reader might find this phrase too obscure. To "cut the Gordian knot" means to "solve a problem boldly," acting "quickly and decisively in a difficult situation." RANDOM HOUSE UNABRIDGED DICTIONARY 824 (2d ed. 1993).

14. ACKERMAN & AYRES, *supra* note 1, at 12.

15. *Id.*

16. *Id.* at 12-13.

17. *Id.* at 43. A similar argument is more fully developed in Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994). Foley's proposed remedy is different. *Id.* at 1204. For a close analysis of the normative aspect of Ackerman and Ayres's position, see Guy-Uriel E. Charles, *Mixing Metaphors: Voting, Dollars, & Campaign Finance Reform*, 2 ELECTION L.J. (forthcoming 2003).

Law professors being as they are, no doubt *someone*, somewhere in the academic world would take issues with these normative premises. On some law faculty—perhaps at George Mason University or the University of Chicago—there is probably someone who will argue that political influence should be a market commodity like any other. But I don't accept that, and I don't think the vast majority of Americans—be they liberal or conservative—would accept it either. Although they would not necessarily express such concepts with quite the subtlety and penetration of Ackerman and Ayres, I believe our citizenry would enthusiastically endorse their goals.

In addition to providing the basis for legitimizing the private sphere, Ackerman and Ayres see Patriot dollars as a way of recreating the social meaning of citizenship.¹⁸ As Ackerman and Ayres observe, "political gift-giving has become an increasingly important way in which Americans manifest their civic concern."¹⁹ (Speaking only for myself, I have to confess that writing those small checks has come to seem a lot more meaningful than voting as an expression of civic involvement.) Patriot dollars will also revive populism, for "[t]he beauty of the patriotic marketplace is that it diminishes the importance of existing links between establishment politicians and established funding sources, instead requiring incumbents to be forever responsive to rising tendencies in public opinion."²⁰ Here, too, I think that most Americans would agree. We should be proud of our role as citizens, and politicians should attend to the popular will, not the desires of special interest groups. Yet, we all know about the disproportionate influence of special interest groups.²¹

Having briefly described their proposals and examined the normative foundations, it's time to take a closer look at the details. One of the truest of truisms, after all, is that the devil is in the details.

18. ACKERMAN & AYRES, *supra* note 1, at 17.

19. *Id.* at 34.

20. *Id.* at 16.

21. See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12–37 (1991) (assessing social science evidence of interest group influence); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 32–40 (1997) (evaluating interest group theory).

The Patriot dollars would work like this: whenever a citizen goes to the polls, she can open a Patriot account and record the number of one of her existing ATM or credit cards.²² Instead of using an existing card, she can also choose to receive a special Patriot credit card.²³ But to use this special card, citizens will have to "prove their identity to an impartial official before entering a secret donation booth to vote their Patriot dollars electronically."²⁴ What happens when you stand in front of an ATM with your Patriot-linked card? First, you will face "a screen revealing three subaccounts, each containing an appropriate amount for the open races [Presidential, Senate, House] in your constituency."²⁵ The money can be designated for any candidate running for the House, anywhere in the country.²⁶ Voters will be free to allocate their funds between primaries and the general election.²⁷

The other half of the proposal is the secret donation booth. Under this scheme, the Federal Election Commission will establish a blind trust to receive all private contributions.²⁸ The checks will show only the trust as recipient; the ultimate target of the money will be on a separate form.²⁹ Donees can draw against these accounts, and normally the balances will be reported daily.³⁰ Individuals who give less than \$200 can get a receipt; others receive only a notice that they gave more than this amount.³¹ Individuals must mail the checks themselves at the post office.³² This blind donation system will apply only to candidate-based contributions to candidates, not to "issue-oriented campaigns independent of a candidate's control."³³

Two additional measures safeguard the anonymity of the system.³⁴ First, there is a five-day revocation period. Hence, a cancelled check is meaningless because the donor might later have

22. ACKERMAN & AYRES, *supra* note 1, at 67.

23. *Id.*

24. *Id.*

25. *Id.* at 77.

26. *Id.* at 77-78.

27. *Id.* at 80.

28. *Id.* at 95.

29. *Id.* at 96.

30. *Id.*

31. *Id.*

32. *Id.* at 97.

33. *Id.*

34. *Id.* at 101.

requested a refund.³⁵ Second, the very largest donors must “actually enter a physical donation booth if they wish to make a gift of more than \$10,000.”³⁶ It will resemble an ordinary voting booth, and only the donor will be permitted inside.³⁷

The big problem is how to prevent people from beating the system. For instance:

Suppose D tells C that she will be depositing \$100,000 on June 1; and suppose that D's campaign chest has been growing at about \$10,000 a day for the past few weeks. Then the 6th comes around, and A's account suddenly jumps by \$110,000. Surely this eye-catching jump will vastly enhance the credibility of D's earlier promise—and a grateful C will not forget D's largesse if he wins on election day!³⁸

Ackerman and Ayres offer a very ingenious solution to these efforts to “bomb” the process. Their solution is a secrecy algorithm that will spread large donations randomly over several weeks.³⁹ They claim that their “secrecy algorithm creates such a ‘noisy signal’ that it will defeat almost all efforts at accurate identification.”⁴⁰ Far be it from me to dispute their math.

The details of the proposal quickly become quite complex, as with most regulatory schemes. Rather than discuss these details, I'd like to emphasize the importance of the venture upon which Ackerman and Ayres have embarked. In their own words:

This is, in short, a very good time to break the cycle of reform and despair that looms before us. Senators McCain and Feingold have shown that the public is serious about serious change. The only question is to identify the reforms which deserve priority in the next major legislative initiative.

The answer will shape the future of American democracy for generations.⁴¹

We might quarrel about whether they have the right solution, but no one should doubt the significance of their quest.

Ackerman and Ayres claim that their proposals are fully con-

35. *Id.*

36. *Id.* at 104.

37. *Id.*

38. *Id.* at 49.

39. *Id.* at 50.

40. *Id.*

41. *Id.* at 178.

stitutional.⁴² “By framing our proposals to comply strictly with all existing constitutional requirements,” they contend that “the new paradigm authorizes massive change *now*, and that activists need not content themselves with marginal improvements until the dawning of the day of judicial repentance.”⁴³

Speaking for myself, I tend to be a little less hopeful about the judicial process, given the current makeup of the Supreme Court and the kinds of new appointments we can currently expect to see. But I will leave the constitutional issues to the next speaker. All we can do where the courts are concerned is to hope for the best. In the meantime, we can at least applaud Ackerman and Ayres for a refreshing and imaginative new approach to what has been one of our society’s most intractable dilemmas.⁴⁴

Thank you. I eagerly await Professor Graye’s comments on the constitutional issues.

Professor Graye:

It’s a pleasure to be here. This has always been one of my favorite cities. Coming as I do from the chilly North, the balmy weather here today is especially welcome.

My primary focus is going to be on the constitutional issues raised in *Voting with Dollars*. I agree with the previous speaker that Ackerman and Ayres have proposed a brilliant new approach to our current campaign finance problems. Unfortunately, however, that does not guarantee its immunity from constitutional challenge.

Before addressing the constitutional issues, I would like to begin with a whirlwind tour of the case law in order to provide some perspective. It takes me about three weeks to cover this material in my course on election law. Obviously, I’m going to be leaving out a lot of nuances, but I think you will get the main outline.

42. *Id.* at 10.

43. *Id.* at 10–11.

44. Another imaginative proposal that might warrant further explanation is John Nagle’s suggestion that legislators “be required to recuse themselves from voting on issues directly affecting contributors.” John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 69 (2000).

It all began in 1976. (Arguably, it may have begun earlier, perhaps with the Watergate break-in, but 1976 is when the judicial doctrine really began.) The United States Supreme Court's landmark decision, *Buckley v. Valeo*,⁴⁵ has determined the shape of current campaign finance law. One of the most important holdings was the constitutionality of public funding for campaigns, even when receipt of those funds is conditioned on some restrictions.⁴⁶ The Court's response to direct limitations on campaign spending, however, was much more mixed.⁴⁷

The Court distinguished sharply between limits on expenditures and limits on contributions.⁴⁸ The Court found the interests invoked by the government to be insufficient to justify the expenditure restrictions.⁴⁹ The Justices were openly scornful of the argument that the expenditure limits were necessary to neutralize the effects of wealth on political campaigns.⁵⁰ According to the Court,

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."⁵¹

Or, as a colleague of mine once put it, the Court's message to egalitarians was "eat dirt and die"!

The Court was less hostile to the contribution restrictions.⁵² Unlike restrictions on a person's expenditures, the Court said, a contribution limitation places "little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe

45. 424 U.S. 1 (1976).

46. *Id.* at 86–109.

47. *Id.*

48. *See id.* at 19–21.

49. *Id.* at 19–20, 39–50.

50. *See id.* at 48–49.

51. *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and *Roth v. United States*, 354 U.S. 476, 484 (1957))).

52. *See id.* at 21.

the contributor's freedom to discuss candidates and issues."⁵³ The Court found ample justification for the restriction:

To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.⁵⁴

"Of almost equal concern," the Court added, is the "appearance of corruption" due to public awareness of the potential for abuse created by large contributions.⁵⁵

Buckley's distinction between expenditures and contributions has always been controversial, but it seems to be holding firm. *Nixon v. Shrink Missouri Government Political Action Committee*,⁵⁶ was a replay of the contribution prong of *Buckley*. A Missouri statute imposed strict limits on contributions to candidates for state office.⁵⁷ Reaffirming *Buckley*, Justice Souter's opinion for the Court upheld these contribution limits, finding them to be "closely drawn' to match a 'sufficiently important interest.'"⁵⁸ Notably, Justice Souter found a legitimate interest not only in preventing *actual* corruption but in avoiding "the broader threat from politicians too compliant with the wishes of large contributors."⁵⁹ The Court continued that to "[l]eave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."⁶⁰ The message of *Shrink Missouri* is that *Buckley* is alive and well, despite its critics.

Many people talk about the "hydraulic effect," in which blocking campaign spending in one area just causes it to pop up somewhere else. Ackerman and Ayres give a nice statement of this theory:

53. *Id.* at 21.

54. *Id.* at 26-27.

55. *Id.* at 27.

56. 528 U.S. 377 (2000).

57. *Id.* at 382 (citing MO. REV. STAT § 130.032 (1994)).

58. *Id.* at 387-88 (quoting *Buckley*, 424 U.S. at 25).

59. *Id.* at 389.

60. *Id.* at 390.

According to this increasingly fashionable view, controlling the flow of campaign funds is like the effort to dam the Mississippi. You may stop the river from overflowing its banks at one point, but this triumph will lead to unexpected inundations elsewhere. Like water seeking its own level, private money will inexorably flow around reformist barriers to overwhelm the political process.⁶¹

The hydraulic view has some historical support. One effect of *Buckley* was an increase in the importance of campaign spending by political action committees ("PACs"), corporations, and other groups. The Court has struggled to deal with the constitutional fall-out of this development. In *California Medical Association v. FEC*,⁶² the Court upheld limits on contributions to PACs.⁶³ A 1971 federal statute limited both individuals' and associations' contributions to multi-candidate political committees to \$5000 per year.⁶⁴ Following the *Buckley* analysis, the Court concluded that the limit on contributions validly furthered the government's interest in preventing actual or apparent corruption.⁶⁵ In contrast, in *FEC v. National Conservative Political Action Committee*,⁶⁶ the Court struck down limits on PAC expenditures.⁶⁷

In the 1990s, the flood of campaign funding jumped into a different channel called "soft money." To an increasing extent, campaign contributions were funneled through political parties, which then used the money to support the election of their candidates. Ackerman and Ayres observe that "[e]normous gifts of soft money" went to political parties, reinforcing the risk that "the American system is indeed veering dangerously toward oligarchy."⁶⁸ Colorado litigation over this use of "soft money" gave rise to two Supreme Court opinions. In the first opinion, a clear majority of the Court held that the First Amendment shielded "independent" party expenditures, just as it would shield independent expenditures by individuals.⁶⁹ The second opinion focused on coordinated expenditures by political parties—whereby the party

61. ACKERMAN & AYRES, *supra* note 1, at 8.

62. 453 U.S. 182 (1981).

63. *Id.* at 184–85.

64. *See id.* at 185 (citing Federal Election Campaign Act, 2 U.S.C. § 441a(a)(1)(C), (f) (1976)).

65. *Id.* at 195–99.

66. 470 U.S. 480 (1985).

67. *See id.* at 483.

68. ACKERMAN & AYRES, *supra* note 1, at 51.

69. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 608 (1996) [hereinafter *Colorado Republican I*].

pays for certain campaign ads over which the candidate has some degree of control.⁷⁰ In an opinion by Justice Souter, the Court reaffirmed its commitment to the *Buckley* framework and upheld the statute's treatment of these coordinated expenditures as candidate contributions.⁷¹ Exactly what impact these decisions will have on current efforts to regulate soft money remains unclear.⁷²

I know this doctrine may seem a little dry, but please bear with me: we're almost done. The only (partial) deviation from the pattern of upholding contribution limits and invalidating expenditure limits has been in the area of corporate speech, where the Court's approach has wobbled.⁷³ In *First National Bank of Boston v. Bellotti*,⁷⁴ the Court struck down a statute prohibiting corporations from spending money to influence referendums on subjects unrelated to their business.⁷⁵ Yet, federal law has long prohibited corporations from making campaign contributions to candidates. In *FEC v. National Right to Work Committee*,⁷⁶ the Court found sufficient potential for corruption to justify such restrictions.⁷⁷ These cases do fit the *Buckley* pattern, but the next decision took a surprising turn.

In *Austin v. Michigan State Chamber of Commerce*,⁷⁸ the Court upheld a state prohibition on corporate expenditures in political campaigns except through special political action funds.⁷⁹ The Court found that the statute burdened the corporation's First Amendment rights.⁸⁰ Nevertheless, the Court upheld the statute because it was supported by a compelling state interest in preventing corporations from channeling funds obtained from con-

70. See *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) [hereinafter *Colorado Republican II*].

71. See *id.* at 447.

72. See Richard L. Hasen, *The Constitutionality of a Soft Money Ban After Colorado Republican II*, 1 ELECTION L.J. 195, 195 (2002) (stating that the decision supports the constitutionality of such a ban but that a change in the Court's composition could doom campaign reform legislation).

73. See *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982); *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 767 (1978).

74. 435 U.S. 765 (1978).

75. *Id.* at 767.

76. 459 U.S. 197 (1982).

77. *Id.* at 208.

78. 494 U.S. 652 (1990).

79. *Id.* at 654-55 (citing MICH. COMP. LAWS § 169.254(1) (1979)).

80. *Id.* at 658.

sumers and investors into political campaigns.⁸¹ The Court distinguished *Buckley* and *Bellotti*, which had found expenditure limits to be too distantly related to “financial *quid pro quo*” corruption of the political process.⁸² Rather than being aimed at corruption, the ban on partisan corporate expenditures was designed to end “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”⁸³

With all of this background in mind, we’re finally in a position to think about the constitutional arguments regarding Patriot dollars and the secret donation booth. Ackerman and Ayres themselves seem rather unconcerned about constitutional issues: their chapter on the subject is entitled, “Who’s Afraid of the Supreme Court?”⁸⁴ Indeed, they see no serious prospect of a constitutional challenge, finding that “[i]f Americans take the path marked out by the new paradigm, the Supreme Court will not stand in the way of a major breakthrough for democracy. There is absolutely nothing to stop citizens from reclaiming their sovereignty—other than a lack of political will and imagination.”⁸⁵

Far be it from me to predict the Court’s future decisions. As Ackerman and Ayres themselves say, “the Supreme Court’s shocking decision in *Bush v. Gore* has shaken the public’s confidence in the impartiality of judges on high-stakes electoral matters.”⁸⁶ If not public confidence, generally, it has at least shaken the confidence of many law professors. Maybe that’s too cynical, but if nothing else, *Bush v. Gore*⁸⁷ does illustrate the difficulty of

81. *Id.* at 660.

82. *Id.* at 659 (quoting *FEC v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480, 497 (1985)).

83. *Id.* at 660. The most interesting aspect of *Austin* is its treatment of the equality justification for campaign reform. Instead of attempting to equalize the relative influence of speakers—a purpose found to be illegitimate in *Buckley*—the corporate expenditure ban “ensures that expenditures reflect actual public support for the political ideas espoused by corporations” by forcing the corporation to raise money for political expenditures separately. *Id.* The implication seems to be that leveling the voices of the wealthy is not a permissible goal, but preventing them from gaining *additional* leverage through the use of corporate funds is allowable. For a perceptive analysis of the *Austin* decision, see Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105.

84. ACKERMAN & AYRES, *supra* note 1, at 140.

85. *Id.* at 141.

86. *Id.* at 131.

87. 531 U.S. 98 (2000).

trying to forecast judicial decisions. Still, it's worth speculating on how the Justices would view *Voting with Dollars*.⁸⁸

One of my reasons for recounting the Court's decisions at such length is to allow you to see how cleverly Ackerman and Ayres have crafted their program. First, as they point out and as our review of the caselaw has confirmed, the program is designed to fit the one interest that the Court has found compelling:

Despite judicial hostility on other fronts, the Court has been remarkably consistent in emphasizing that there *is* one rationale for public regulation with an impeccable constitutional pedigree. Like most sensible people, the justices are well aware that big givers can gain special influence over politicians, and they have regularly sustained legislation that can plausibly be viewed as efforts to reduce the risk—or even the appearance—of corruption.⁸⁹

Thus, the Court should be sympathetic to the goal of reducing special interest influence, at least in the form of actual or apparent quid pro quos.⁹⁰

Second, the *Buckley* Court did accept public funding, even accompanied by conditions on candidates who accept the funding.⁹¹ The Patriot dollars part of the scheme is simply an indirect method of public financing.⁹² Indeed, the Court's recent decision upholding school vouchers suggests that it may find Patriot dollars even more acceptable than direct public funding.⁹³ In the voucher case, the Court was willing to allow vouchers in a context where it would probably have found direct funding unconstitutional, because the allocation of the funds depended on "true private choice."⁹⁴ So the basic idea of Patriot dollars looks bullet-proof.

Third, the scheme neither directly controls speech, nor limits the amounts of contributions—except in a few special circumstances.⁹⁵ Rather, it allows donors to say anything they like; the only limit is that they can't give their checks directly to candi-

88. ACKERMAN & AYRES, *supra* note 1.

89. *Id.* at 147.

90. *Id.*

91. *Id.* at 142–143.

92. *Id.* at 142.

93. *Id.*; see *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2465 (2002).

94. *Zelman*, 122 S. Ct. at 2467.

95. ACKERMAN & AYRES, *supra* note 1, at 182.

dates.⁹⁶ This looks like a limitation on conduct rather than speech.⁹⁷ Thus, Ackerman and Ayres argue, their proposal places no limit on free speech at all:

Our free-speech analysis has been exceptionally trouble free because we could entirely avoid this classical exercise in balancing. The reason is simple: Our model statute refuses to impose *any* new restrictions on the things private citizens can say to one another. As a consequence, there was no occasion to begin balancing, because there was no effort to repress anybody's speech in the first place.⁹⁸

Finally, Ackerman and Ayres say, there is only a minimal intrusion on freedom of association: "Our statute only prohibits groups from creating political action committees that shunt money directly to candidates."⁹⁹ Otherwise, groups remain free to advocate issues or endorse candidates.¹⁰⁰ They can also publicly donate Patriot dollars to candidates.¹⁰¹

As you can see, the proposal really does a pretty good job of squeezing itself within current doctrine. However, I am not as certain as Ackerman and Ayres about how the Court will respond.¹⁰² No doubt there is plenty to quibble about in the details of their proposals—and as we have seen, the Court is quite capable of constitutional nit-picking in this area. But there are some more basic issues.

To begin with, Ackerman and Ayres may underestimate the effect of their proposal on associational rights.¹⁰³ Consider how we would view such restrictions outside of the political context. Ackerman and Ayres themselves ask to "[i]magine what would happen to Yale's large contributions if the university announced that it would accept only anonymous donations."¹⁰⁴ This is less troublesome in its effect on contributions (where, after all, the Court has upheld direct limitations) than on expenditures.¹⁰⁵ The

96. *Id.* at 148.

97. *See id.*

98. *Id.* at 150.

99. *Id.* at 152.

100. *Id.*

101. *Id.* at 153.

102. *Id.* at 151–53.

103. *See id.* at 150–54.

104. *Id.* at 251 n.7.

105. *See id.* at 119. Even the \$100,000 per year limit on an individual's contributions to all campaigns may be troublesome. *Id.* at 117.

scheme impacts expenditures by associations rather directly. It covers all issue advocacy by political parties, which seems very hard to square with *Colorado Republicans I*.¹⁰⁶ It also places a cap on individual contributions to PACs for issue advocacy,¹⁰⁷ and encumbers issue advocacy by any group that also wants to set up a PAC using Patriot dollars.¹⁰⁸ Issue advocacy, as opposed to explicit campaign speech, is a touchy subject for regulation.¹⁰⁹ Most of these limits are backstops to the limits on direct contributions, intended to stop evasion of the blind donation booth.¹¹⁰ Given the cumulative impact of the provisions, it may be hard to persuade the Court that they are narrowly tailored to the compelling interest in preventing corruption.¹¹¹

More significant is the possibility that the Court will reject the secret donation booth on principle. The whole idea of the secret donation booth is that we are better off suppressing information about the identity of donors.¹¹² But the Supreme Court of the United States likes to fulminate about the evils of suppressing information, repeating that the choice between the dangers of suppressing information and the dangers of too much information is a choice that "the First Amendment makes for us."¹¹³ If the Court thinks current disclosure and contribution limits are reasonably effective, it might be unwilling to accept an anonymity requirement as an acceptable alternative; in fact, it might think that the anonymity requirement is more intrusive on First Amendment values. For example, one might wonder whether it is really necessary, in the name of blocking corruption, to prevent issue-based groups from directly collecting small gifts and giving them openly to candidates.¹¹⁴

106. 518 U.S. 604, 608 (1996); ACKERMAN & AYRES, *supra* note 1, at 117–18, 124.

107. ACKERMAN & AYRES, *supra* note 1, at 117.

108. *Id.* at 119, 124–25.

109. *Id.* at 124.

110. *Id.* at 97.

111. *But see id.* at 152–53.

112. *Id.* at 26–30.

113. *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 96–97 (1977) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976)). Indeed, *Linmark* could be considered directly on point: the anonymous donation booth is the equivalent of the undisclosed house sale. *Id.* at 86.

114. The Court's decision in *Beaumont v. FEC*, 278 F.3d 261, 277 (4th Cir. 2002), cert. granted 123 S. Ct. 556 (2002), may shed light on this.

There is all the more reason to be concerned about the Court's reaction because Ackerman and Ayres do not conceal their central purpose, which is to cancel out the undue influence of the wealthy on political debate.¹¹⁵ As you'll recall, Professor Browne extolled their justification for this goal.¹¹⁶ It's true that the proposal is designed to look corruption-oriented, but the underlying motivation is clearly to promote equality. Recall that in *Buckley*, the Court found this particular interest in equality to be an affront to the First Amendment.¹¹⁷ Knowing of the core purpose of the proposal, the Court is all the more likely to be stingy in its appraisal of specific provisions.

I'm afraid this has been a rather pedestrian discussion of doctrine. From that point of view, I am sure you'll find our next presentation a bit different. From our chat before the session, I understand that Professor Whyte is planning to connect campaign reform issues with a Canadian campaign to kill harp seals. Sounds pretty lively! I will be waiting with considerable anticipation to find out how he manages to make this connection.

Professor Whyte:

Well, I guess it's my turn. As you know, I'm not really a constitutional scholar, so I was a little nervous about appearing here today. Luckily, the last speaker has covered the constitutional issues quite thoroughly.¹¹⁸ I will focus instead on the policy aspects of the proposal. I'm going to raise some questions about whether the authors have correctly diagnosed the problem, and about whether their solution will work as well as they expect.

But before I get into that, I want to make clear my admiration for their creativity and ingenuity. Public policy debates tend to get stuck in ruts, and we badly need fresh insights on problems like campaign reform.

I know that it may seem odd to refer to environmental law in this setting. But I take some comfort from the fact that Ackerman

115. See ACKERMAN & AYRES, *supra* note 1, at 62.

116. See *supra* notes 10–44 and accompanying text.

117. *Buckley v. Valeo*, 424 U.S. 1, 54 (1976); see *supra* notes 50–51 and accompanying text.

118. See *supra* notes 45–117 and accompanying text.

and Ayres themselves do so at the beginning of their book.¹¹⁹ They refer to the current paradigm as treating “big money as if it raised a problem similar to the one posed by polluters dumping garbage into a waterway.”¹²⁰ They go on to compare current campaign regulations to EPA regulations, pointing out that the EPA “not only restricts the garbage each polluter can dump but places an overall limit on the amount of junk in the river.”¹²¹ “Why not,” they ask rhetorically, “do the same when big money pollutes democratic politics?”¹²² I say this is a rhetorical question because the authors promptly dump on the people who approach the issue this way. They reject this analogy on the next page because voting is special: “Command and control, bureaucratic subsidies, and full information are part of the problem [in politics], not part of the solution.”¹²³

That may well be true, but in those terms, even environmental law is starting to look a lot less like their picture than they may realize. Ackerman and Ayres may be right that the old environmental regulation may not be very relevant in this context. In my view, however, the new environmental regulation has some important lessons for us.¹²⁴

Because of my concerns about the Ackerman and Ayres proposal, I would be very nervous about ditching the current system of campaign regulations and adopting the proposal outright. As an environmental law teacher, I tend to see things in ecological terms. The political system is a very complex ecology, and we should be leery of making huge overnight changes.¹²⁵ But that doesn't mean that we should just leave it in its present damaged state. Instead, I think we should take a leaf from current ecological thinking and consider using a technique called “adaptive management” to revitalize this ecosystem.¹²⁶ I will close with some thoughts about how *Voting with Dollars* might fit into such an approach.

119. See ACKERMAN & AYRES, *supra* note 1, at 3.

120. *Id.* This pollution analogy is skillfully developed in Nagle, *supra* note 5, at 316–27.

121. ACKERMAN & AYRES, *supra* note 1, at 3.

122. *Id.*

123. *Id.* at 4.

124. Like any new regulatory regime, there is a necessary price tag associated with the exchange of new systems and solutions for outdated ones. Our task today is to determine if Ackerman and Ayres's price tag is too high. See *id.* at 3–5, 18–22.

125. See *infra* notes 172–77 and accompanying text.

126. See *infra* notes 178–82.

I don't want to belabor these points, but I have some real doubts about whether their system will work as well as Ackerman and Ayres anticipate. Some of this may just seem like nit-picking, but it's these little practical details that sometimes trip up a really nifty scheme.

Let me begin with Patriot dollars.¹²⁷ The big question here is the participation rate.¹²⁸ Ackerman and Ayres say they would be "very surprised if the first election cycle under the new paradigm did not generate more funds than the last cycle held under the current system."¹²⁹ But, they add, "we have been surprised before."¹³⁰ As they admit, "there isn't anything in the real world that is close enough to Patriot dollars to permit meaningful extrapolation."¹³¹

One problem is motivation. I don't know whether people really care enough to participate. Ackerman and Ayres give us a lot of discouraging information about voter apathy.¹³² Only a few voters care enough to vote against someone for taking special interest money.¹³³ Only between four and twelve percent care enough to donate even a few dollars of their money to political candidates.¹³⁴

One reason for my concern is that Patriot dollars won't be all that easy to use.¹³⁵ Ackerman and Ayres seem to think otherwise, but I bet they're the kind of people who know how to program their VCRs. The Ackerman and Ayres proposal looks a bit more daunting.¹³⁶ In addition, you can't spend your Patriot dollars unless you inform yourself about the candidates, but Ackerman and Ayres concede that "most voters pay scant attention to politics."¹³⁷ The informational resources of the poor, the uneducated,

127. See ACKERMAN & AYRES, *supra* note 1, at 4–6.

128. See *id.* at 89.

129. *Id.*

130. *Id.*

131. *Id.* at 87.

132. See *id.* at 26–30.

133. See *id.* at 27.

134. *Id.* at 31.

135. See *id.* at 4–11.

136. See *id.* at 33–38. Much of the complexity is apparently designed to prevent sales of Patriot dollars. See ACKERMAN & AYRES, *supra* note 1, at 38–40. I am not sure that sales are a serious problem. In equilibrium, Patriot dollars should trade for their face value minus transaction costs, so there is no incentive to purchase them.

137. *Id.* at 27.

and the young are already stretched thin.¹³⁸ Yet, these are the very groups whose voices an egalitarian should be most concerned about.

Also, I have trouble imagining how their system is going to be implemented on real-world ATMs.¹³⁹ At least where I live, ATMs aren't very fancy; they're not much like iMacs.¹⁴⁰ An ATM screen doesn't display much information at a time, and the inputs are limited. Somehow, this limited terminal is going to have to offer voters a lot of choices, including allocations between primary and general elections, and the option of donating to any congressional candidate anywhere in the country.¹⁴¹ This is going to take a lot of sub-menus. My guess is that people will be just about as unhappy with this system as with automated voice menus now available on the telephone. You know what I mean—where you have to press five different numbers in response to a succession of annoying verbal options, in the hope of eventually getting to a live person in the end. We are asking a lot of citizens who couldn't handle the famous South Florida butterfly ballot.

Another problem is that people may be unwilling to register their ATM cards. They may not want to entrust local election officials with this information, or they may fear that it will fall into the hands of hackers.

So, I am not so sure how many people are going to use these Patriot dollars. In a footnote, Ackerman and Ayres present some worrisome empirical evidence about likely participation rates.¹⁴² Only about seven percent of taxpayers claimed the small deduction for campaign contributions, which federal law used to provide.¹⁴³ In Minnesota, only sixty thousand people claimed a state refund for political contributions, and only about five times that many used the check-off box on their tax returns to contribute to

138. See MARTIN P. WATTENBERG, WHERE HAVE ALL THE VOTERS GONE? 2-3, 77, 91-95, 142-44, 163 (2002) (arguing that the political system needs to be more user friendly to attract voters).

139. See ACKERMAN & AYRES, *supra* note 1, at 4-11.

140. The Law Review editors were worried that the term "iMac" might be confusing to some of the less computer savvy. It refers to a product in the Macintosh line of Apple Computers.

141. See *id.* at 256 n.2. There is no reason we can't upgrade all of those ATMs to allow greater input and output, but then we're talking about *real* money. After all, there are over 140,000 ATMs in the country. *Id.* at 256 n.2.

142. *Id.* at 262 n.33.

143. *Id.*

a campaign election fund.¹⁴⁴ Minnesota is a small state, but not *that* small. It also has very high rates of political participation.¹⁴⁵ In the 2000 Presidential election, sixty-nine percent of the voting age population went to the polls—a little over two million people.¹⁴⁶ Out of this total, the number of Minnesotans who could be bothered to use the tax check-off is not impressive.¹⁴⁷ My guess is that national participation would be a lot lower.¹⁴⁸

How many people should we expect to register their ATM cards, find out about candidates, go to an ATM, and work their way through whatever menus are required to make a donation? No doubt, some people will make the effort, just as some people will stand in line to vote in a local school board election. But I wouldn't be a bit surprised if participation starts small and stays small.

This is important, not only because of the significance that Ackerman and Ayres put on Patriot funding for its own sake, but because of the way it affects the rest of their scheme. They are counting on Patriot dollars to flood out efforts by special interests to dodge the anonymous donation, both through "issue advocacy" campaigns or otherwise.¹⁴⁹ If Patriot dollars total \$500 million rather than the \$5 billion they forecast,¹⁵⁰ this argument won't work. Ackerman and Ayres have a scheme to multiply Patriot dollars in order to help balance private donations,¹⁵¹ but if the multiplier has to be five or ten, a small percentage of the population is going to be controlling the flow of a large amount of public money.¹⁵² That would merely recreate the excess influence of small minorities that characterizes current campaign finance.¹⁵³

I also have some doubts about the security of the anonymous donation booth. The movie industry spent millions and millions of

144. *Id.* at 263 n.33.

145. Office of the Minn. Sec'y of State, November 7, 2000 General Election Results, at http://elections.sos.state.mn.us/ENR2000_General/ElecMenu.htm (last visited Mar. 13, 2003).

146. *Id.*

147. *See* ACKERMAN & AYRES, *supra* note 1, at 262 n.33.

148. For further discussion of the participation issue, see Charles, *supra* note 17.

149. *Id.* at 120.

150. *See id.*

151. *Id.* at 120–21.

152. *See id.* at 120–21, 252 n.9 (giving figures on size distributions of donations).

153. *See id.* at 252 n.9.

dollars to devise a secure encryption for DVDs, in order to prevent unauthorized copying.¹⁵⁴ A fifteen-year-old Norwegian boy promptly cracked the code.¹⁵⁵ How confident can we be that no one will hack into all of the various electronic records involved in this scheme? Especially since a lot of people might think it's public spirited to expose the sources of a candidate funding—one person's breach of security is another person's "turning over a rock to see what's crawling around underneath."

And can we be sure of the anti-"bombing" encryption scheme that is supposed to mask large donations from candidates?¹⁵⁶ The scheme does create a lot of noise in the system, but it's still possible to communicate despite that noise if you're clever.¹⁵⁷

Recall that candidates will get their money on a daily basis, except "when there is a truly remarkable increase in receipts arriving on a particular day, and only when the uptick is attributable to a small number of big gifts."¹⁵⁸ One possibility is to avoid triggering the algorithm by making multiple gifts just below the threshold. Ackerman and Ayres say they have an answer to this strategy,¹⁵⁹ but I'm not altogether convinced. Ackerman and Ayres admit that further refinements of the secrecy algorithm may be necessary.¹⁶⁰ I wonder whether there's any ultimate way to prevent the transmission of credible messages.

Several other factors might also make it easier to crack the system. First, Ackerman and Ayres assume that most people won't reveal how they spent their Patriot dollars.¹⁶¹ But as exit polls show, it's possible to get very reliable information about how people performed in a completely confidential setting, just by holding

154. See Rachel Simpson Shockley, Note, *The Digital Millennium Copyright Act and the First Amendment: Can They Co-Exist?*, 8 J. INTELL. PROP. L. 275, 279 (2001) (noting that the fifteen-year-old, along with two others whom he met off the internet, reverse engineered a DVD player to create DeCSS, which is capable of decrypting DVDs).

155. *Id.* For further information about the ensuing litigation and the teenager's recent acquittal, see Electronic Frontier Foundation, Norwegian Teenager Jon Johansen Acquitted in DVD Case (Jan. 7, 2003), at http://www EFF.ORG/IP/Video/DeCSS_prosecutions/Johansen_DeCSS_case/20030107_eff_pr.html (last visited Mar. 20, 2003).

156. ACKERMAN & AYRES, *supra* note 1, at 104–05.

157. *Id.* at 107.

158. *Id.* at 105.

159. *See id.* at 238–39.

160. *See id.* at 107.

161. The authors support their assumption by analogizing the use of Patriot dollars to disclosure of voting, but for some reason they seem to overlook the existence of exit polls as an analogy. *See id.* at 29.

up a microphone and asking them afterwards. If candidates can accurately track the background flow of small contributions, it will be easier to factor them out of the statistics and find signs of the larger contributions. Second, donor anonymity may not be as simple as Ackerman and Ayres think.¹⁶² Wealthy individuals and rich organizations generally have staffs. If people start playing games with the system—for example, by making contributions to the blind trust and then getting refunds sent to another checking account—they face a very real risk of exposure.

In short, I find some reason to doubt whether the scheme will work as smoothly as its creators imagine. These concerns about the mechanics of the scheme are less significant, however, than the uncertainty about the nature of the problem that is being addressed. Much of Ackerman and Ayres's book seems to be founded on the view that campaign donors are buying influence.¹⁶³ That seems logical enough, but an alternative view is also somewhat plausible. Donors may simply give their money to candidates who *already* support their views, expecting those candidates to stick with their established positions in the future.¹⁶⁴ Although I'm no expert, the empirical evidence on this question seems to be mixed. There is some evidence that the "campaign contribution contract," if there is one, is very weak and lacks serious sanctions.¹⁶⁵

Thus, to the extent that the secret donation booth is supposed to prevent legislators from rewarding contributors with favors, we don't really know whether it is addressing a real problem—let alone the scope of the problem. We also can't verify the theory that special interests will stop making donations if they can't expect return favors. They may be more interested in electing legislators with their favorite views than in any implicit *quid pro quo*.

162. *See id.* at 28–30.

163. *Id.* at 30–32.

164. *See* Nolan McCarty & Lawrence S. Rothenberg, *Commitment and the Campaign Contribution Contract*, 40 AM. J. POL. SCI. 872, 874 (1996).

165. *See id.* at 872–75 (finding weak sanctions against donors who fail to renew their contributions); *see also* Stephen Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?* 17 J. ECON. PERSP. 105 (2002) (summarizing empirical and theoretical arguments against theory that contributions influence future legislative votes). *But see* Stacy B. Gordon, *All Votes Are Not Created Equal: Campaign Contributions and Critical Votes*, 63 J. POL. 249, 250–53 (2001) (conceding that prior evidence on influence of campaign contributions is ambiguous but arguing that contributions are more likely to influence legislators when they are the swing voters on a provision).

I must say that I find the Ackerman and Ayres view of the subject intuitively plausible, but we just don't know whether it is correct. If it is wrong, then their proposal may be misdirected, imposing significant social costs for little gain. These social costs do not merely include the direct costs of their donation system, but depriving voters of information about what groups support particular politicians. For example, as an environmentalist, I would find it significant that a given candidate was receiving heavy funding by the oil industry, but the secret donation booth deprives me of this information.

If participation in the patriot dollar program does not meet their expectations, while special interest funding remains high despite the anonymous donation booth, then the Ackerman and Ayres proposal might not do very much to equalize the political voices of our citizens. Under those circumstances, large-scale public funding by the government might be a better option. In the meantime, we could be worse off than we are under the current system.

Another uncertainty is the extent to which independent expenditures are an important part of the problem. Ackerman and Ayres assume that uncoordinated independent expenditures are much less valuable to candidates than contributions.¹⁶⁶ If they are right, *and* if large, direct contributions do dry up because of the secret donation booth, *and* if participation in the patriot program is reasonably high, then politicians may cease to devote so much time and energy to getting the support of large donors.¹⁶⁷ I agree with Ackerman and Ayres that this would be a desirable outcome.¹⁶⁸ But that is a lot of ifs.

My basic point so far has been that there are tremendous uncertainties surrounding the Ackerman and Ayres proposal, both in terms of whether it correctly identifies the root problem and whether its mechanisms will work as planned. I certainly don't mean to make a firm prediction about the success or failure of their proposal. What I do mean to say, however, is that there is a lot more uncertainty than you might expect from reading the

166. See ACKERMAN & AYRES, *supra* note 1, at 122.

167. In the alternative, as Ackerman and Ayres put it, "[p]oliticians will dispense with most private sessions with big donors when they can no longer tell whether there is a real payoff." *Id.* at 95.

168. See *id.* at 94.

book. Maybe it would work, maybe it wouldn't. If it doesn't, we might do some significant harm to the political system before we figured out the problem and went on to some other method of campaign regulation. But that's not necessarily a justification for giving up on efforts to address campaign reform.

It's here that I think we may be able to learn something from environmental law. I realize that the connection may not be immediately obvious, but I hope you'll be patient with me during what might appear to be a long digression. (If nothing else, I hope you'll find it an *interesting* digression.)

Somewhat paradoxically, if there's one thing that environmental regulators do really know, it's the extent of their own uncertainty. The point was nicely made by Christopher Stone in a book published ten years ago: "[w]e are only beginning to learn how the world works."¹⁶⁹ After recalling "our ignorance . . . about the dynamics of globe-spanning climate and current,"¹⁷⁰ he added some examples: "Scientists have only started to inventory the world's forests and monitor the thickness of the ice caps. . . . As for biodiversity, we do not know how many species there are to imperil."¹⁷¹ Part of the problem is simply that we are in the early stages of scientific investigation, but another part of the problem is that so many environmental problems involve complex dynamic systems with nonlinear properties. For example, instead of the familiar "balance of nature," ecologists currently tend to view the biosphere as characterized by complicated, chaotic interactions in which any equilibrium is purely temporary.¹⁷²

The new ecology indicates that prediction is very difficult and that our intuitions about causation may not hold true. For instance, consider the Canadian government's effort to rescue its

169. CHRISTOPHER D. STONE, *THE GNAT IS OLDER THAN MAN: GLOBAL ENVIRONMENT AND HUMAN AGENDA* 24 (1993).

170. *Id.*

171. *Id.*

172. For an excellent summary of the recent literature, see Fred Bosselman, *What Lawmakers Can Learn from Large-Scale Ecology*, 17 J. LAND USE & ENVTL. L. 207 (2002). For a survey of implications of environmental regulation and understanding law as a complex adaptive system, see J.B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System: How To Clean Up the Environment by Making a Mess of Environmental Law*, 34 HOUS. L. REV. 933 (1997). Recent research on large-scale networks also reveals the emergence of unexpected properties that may make control difficult; for an accessible introduction to the subject, including a discussion of implications for ecology, see generally MARK BUCHANAN, *NEXUS: SMALL WORLDS AND THE GROUNDBREAKING SCIENCE OF NETWORKS* 138–55 (2002).

failing cod fishery by killing harp seals.¹⁷³ The government's reasoning was simple: harp seals eat cod; ergo, fewer harp seals means more cod. The Canadian government insisted that this was a matter of common sense.¹⁷⁴ (I have to say that even if the logic was right, I'd feel some qualms about the brutality of the solution. But I'm just a soft-headed environmentalist.) As it turns out, however, this common sense logic overlooks the fact that harp seals eat many other species, which in turn affect additional species, which in turn affect cod. Consequently, the effect of eliminating half a million harp seals per year is hard to predict:

In the face of this overwhelming complexity, it is clearly not possible to foresee the ultimate effect of killing seals on the numbers of some commercial fish. With fewer seals off the Canadian coast, the number of halibut and sculpin might grow, and since they both eat cod, there may well end up being *fewer* cod than before.¹⁷⁵

Moreover, computer simulations show that, while removing some species may have little effect on the overall food web, removing others can cause drastic changes affecting many species.¹⁷⁶

The Ackerman and Ayres proposal might have similar unpredictable effects. For example, if people feel that they have fulfilled their civic duties by using the Patriot dollars, they might be less likely to turn out and vote in primaries. Or, having committed themselves to a candidate with a Patriot donation early in the campaign, they may feel wedded to that candidate and close their ears to any further information. Either of these effects would lead to adjustments in the behavior of candidates and other political actors, with further unpredictable consequences.¹⁷⁷

Understanding the dynamic and unpredictable nature of ecological systems has required considerable rethinking of methods of environmental management. The buzzword these days is "adaptive management"—the theory is that regulatory methods must be experimental and provisional, designed to foster a learn-

173. See BUCHANAN, *supra* note 172, at 140-41.

174. *Id.* at 141.

175. *Id.*

176. *Id.* at 152-54.

177. For a discussion of other possible forms of fallout from the proposal, see generally Pamela S. Karlan, *Elections and Change Under "Voting with Dollars,"* 91 CAL. L. REV. (forthcoming 2003).

ing process by the regulator.¹⁷⁸ Again, fisheries provide an instructive example. For instance, fisheries expert James Wilson has several suggestions about how to cope with uncertainty. One is to use nested governance areas to foster parallel learning about ecosystem behavior.¹⁷⁹

I suppose it would be possible to develop some kind of analogy between voters and schools of fish, with PACs and soft money playing some kind of predatory role. I can assure you that I have no intention of doing so, however. PACs aren't halfway as cute as harp seals. No kidding.

Rather, I think the lesson from the recent environmental experience is less direct. Like ecology, the political system is dynamic and unpredictable, with numerous feedback loops and other interactions. We can't design solutions on the assumption that we have already accurately diagnosed the problem and can predict the effects of a proposed solution. But that does not mean paralysis. Instead, it means a more experimental approach, with lots of emphasis on learning and modifying our initiatives as we go along.¹⁸⁰ I would draw a couple of lessons about campaign finance reform.

First, it is foolhardy to believe that we can replace existing mechanisms with radical new alternatives, as Ackerman and Ayres propose, and have any hope of predicting the ultimate outcome. Politics is a very complex system, and predicting how it will react to a radical disturbance is as difficult as predicting the effect of introducing or removing a species in an ecosystem. This is a high-risk gamble. At this point, I don't think that Ackerman and Ayres have made the case for rolling those particular dice.

178. See JOHN COPELAND NAGLE & J.B. RUHL, *THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT* 323–39 (2002); Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 190, 194–206 (2002).

179. See James Wilson, *Scientific Uncertainty, Complex Systems, and the Design of Common-Pool Institutions*, in *THE DRAMA OF THE COMMONS* 327, 340, 345–49 (Elinor Ostrom et al. eds., 2002).

180. For a general argument for an experimental approach to public law issues, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998). At this point, I'm not prepared to work out exactly what "adaptive management" would mean for campaign reform. All such flexible approaches to management raise questions about the scope of administrative discretion. Since we are at the heart of politics in this instance, those concerns would be especially acute. So it may not be possible to directly translate what environmental regulators are beginning to do into the sphere of campaign regulation.

Second, the only way to make any real progress in restoring the political ecology is to conduct some experiments. In the article I discussed a few minutes ago, Wilson mentioned the desirability of “nested governance” to obtain the benefits of parallel learning.¹⁸¹ That is, if we try different methods in different regions, and compare the results with the status quo, we begin to learn something about how to fix things. Although I’m not prepared to endorse the principles of *Voting with Dollars* as a nationwide experiment, it would be extremely useful to give it a try on a smaller scale.¹⁸²

I do not see any reason why a single state shouldn’t adopt the proposal—the downside risk is much smaller at the state level. Actually, it would be ideal if several states would conduct somewhat different experiments, adopting different parts of the scheme and trying some variations. If the experiment works, that’s wonderful, and we can adopt the approach nationally.

On the other hand, if it doesn’t work, we may be able to do some fine-tuning to remove some flaws in the proposal. Or maybe we will learn that whole idea is unworkable, for example, that people just won’t bother to make their ATM contributions. If so, we’ll have to look for new ways to address the problems.

If we ditch our current scheme of campaign regulation at a national level in favor of every clever scheme that comes along, we’re courting disaster, but if we refuse to experiment, we’re never going to get anywhere. So let’s see Connecticut or some other state adopt contribution ATMs and donation booths, and let’s find out what happens.

Ackerman and Ayres describe themselves as “unrepentant social engineers.”¹⁸³ I’m not by any means in favor of sitting back and ignoring social problems. But I think what we need in the Twenty-First Century are not social engineers but social ecologists.

Oh dear, I see that I’ve run way over my time. I wondered why the moderator kept handing me little slips of paper. Unfortunately, I don’t have my glasses so I couldn’t read them. Anyway,

181. See *supra* text accompanying note 179.

182. For an example of successful state-level innovation in campaign finance regulation, see generally *Daggett v. Comm’n on Governmental Ethics & Election Practices*, 205 F.3d 455 (1st Cir. 2000) (upholding Maine’s innovative public funding scheme).

183. ACKERMAN & AYRES, *supra* note 1, at 33.

thank you all for being so patient with me. Hopefully, when I write this up for the law review, it will be a little more coherent! Thanks again.

Moderator:

I'm sure that those of you who are experienced conference-goers aren't surprised that the presentations ran over their allotted times. I know you must be getting hungry—all that talk about fish probably only made it worse!—but I think we do have time for a couple of questions while they're setting up lunch in the courtyard.

Audience Member:

This is for Professor Whyte. Could you explain your method of getting around the anonymous voting booth for us?

Professor Whyte:

Let me start by giving you an example, then I'll explain Ackerman and Ayres's response to this strategy, and then I'll tell you why I'm not satisfied with the response. This gets a little complicated, and it's a bit tangential. So if you're not too interested in the details, you might want to use this chance to duck out to the restroom.

As Ackerman and Ayres note, a married couple can make a joint contribution of \$5,000 to a Congressional House race, and a candidate who sees this contribution on the promised day would have a "38 percent confidence that a claimed gift had in fact been made."¹⁸⁴ What they mean by this is that sixty-two percent of the time, a candidate could expect a shift this size on a single day purely by chance.¹⁸⁵ But suppose that the couple tells ten candidates that they will make such a contribution to each of them on specific designated days, for a total of \$50,000. The odds that all

184. *Id.* at 290 n.6.

185. *See id.* at 234–35 tbl. 3. Ackerman and Ayres consider, but reject as too unworkable, a formula that would reduce the total cap depending on the number of campaigns to which a person contributed. *Id.* at 239.

ten would see a shift of this size on those specific days merely by chance is only about 0.8%. So if candidates do see such a shift, they can really be quite confident that a gift was made.

Audience Member:

Didn't Ackerman and Ayres think of this problem?

Professor Whyte:

When I read the Appendix, I found out that they *had* thought of this problem, which made me feel a little less clever. But their responses aren't very convincing. They say that there are not enough campaigns (only thirty-nine donation periods per House cycle), and that multiple donors will claim credit after the fact. The first is not persuasive because there are also hundreds of House candidates in any given year. The number of ways of picking ten candidates and contribution periods is astronomical.¹⁸⁶ The second can be defeated by simply telling the candidates the plan in advance, so no one else can claim credit afterwards. And because there are so many ways of picking the ten combinations of candidates and contribution dates, the odds that two contributors will happen to pick the same ten in advance are very small.¹⁸⁷

186. Even if you limit yourself to the twenty most contested House races and assume that the contributions must all go to members of the same party, there are 780 "slots" (combinations of 20 candidates each with 39 time periods for a donation) and 21,678,298,899,586,545,657,090 or about 21 billion trillion distinct ways of selecting ten slots. (If my calculations are correct, this is $(780!)(770! \cdot 10!)$, using a standard combinatorial formula which many readers may remember from college or in some cases high school.) The chances of two donors accidentally picking the same combination of ten slots is too ridiculously small to even write down.

187. False claims by third parties may not be much of a problem, but it's still possible that a donor will lie, telling the donor that the ten contributions are planned but not following through. In fact, if there is no cost to being caught, everyone in the world should adopt this strategy, since there is some chance it will work and the out-of-pocket cost is zero. In this scenario, Ackerman and Ayres would be right that false attributions would defeat the system. But if donors care about their political reputations, this is a very bad strategy. There is only a 0.8 percent chance that the scheme will work, and if it doesn't work, the purported donor's future credibility is impaired, not only with these candidates but with everyone else who hears about their cheating. In effect, they are playing Russian roulette with their political future if they lie. Of course, a full analysis of all the permutations would be complicated, and I don't claim to have Ayres's expertise in game theory. But I'm pretty confident that this signaling method works if reputations can be used as hostages for the donor's credibility.

Audience Member:

But don't Ackerman and Ayres have a way of blocking these "complex bombing scenarios" by limiting the total amount for contributions to \$100,000? Surely your strategy could be blocked that way or with some other modification of the plan.

Professor Whyte:

I don't think that specific response works here. As they point out, their limit allows individual contributions to forty House or Senate candidates.¹⁸⁸ That's four times as many races as I need for my method to work. On your larger point, though, I am sure they could block anything I can come up with. In fact, maybe I've missed some subtle feature of their original proposal that would already do so. But the real question isn't whether they're smarter than I am; it's whether they're smarter than that fifteen-year-old Norwegian.¹⁸⁹ Is this system immune from being hacked? That I'm not so sure about.

Moderator:

Obviously, our mistake was inviting you to speak instead of inviting the Norwegian kid! Seriously, I think we have time for one more question.

Audience Member:

This one is for Professor Browne. You were very enthusiastic in your description of *Voting with Dollars*. The other speakers have expressed some serious reservations. Has that affected your opinion?

Professor Browne:

Not really. Of course, I take my colleagues' comments seriously, and some of their observations might be useful in fine-tuning the

188. ACKERMAN & AYRES, *supra* note 1, at 240.

189. See *supra* note 155 and accompanying text.

proposal. But basically, any really new idea is going to face some risk of judicial attack. And by definition, because a new idea is new and untested, it will involve some uncertainty. The question is whether we can afford to stumble along with more variations on the same old theme or with a few little micro-experiments. I don't think so. I think our society desperately needs change, and we can't afford to shy away from bold new options just because they *are* bold and new.

Moderator:

I'm told that lunch is served, so Professor Browne will have to have the last word in this session. I hope you will all join me in thanking the panelists for their presentations, and of course in thanking the two authors whose pathbreaking book we've been talking about. They've all given us much food for thought.